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No. 05-260

In the Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
PETITIONERS

v.

MID ATLANTIC MEDICAL SERVICES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a civil action brought under Section 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. 1132(a)(3), to enforce a plan term requiring reimbursement of plan-paid medical expenses out of funds a participant recovers from a third party responsible for the underlying illness or injury, is an action for "appropriate equitable relief" authorized by that section, when reimbursement is sought through imposition of a constructive trust or an equitable lien on the proceeds of the third-party recovery that are traceable to a specific fund in the participant's possession.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of "appropriate equitable relief" available in a civil action by a plan fiduciary under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3). The Secretary of Labor has similar authority to bring a civil action for "appropriate equitable relief" under Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5). Accordingly, the Court's determination of what constitutes "appropriate equitable relief" may affect not only the scope of private civil actions under Section 502(a)(3), which are a necessary complement to actions by the Secretary, but also the scope of the Secretary's own authority under Section 502(a)(5).

STATEMENT

1. Petitioners Joel and Marlene Sereboff are members of a self-funded health insurance plan sponsored by Marlene Sereboff's employer, the Katzen Eye Group. Pet. App. 3a, 24a, 36a-37a. On June 22, 2000, petitioners were injured in an automobile accident. *Id.* at 3a-4a, 36a. The plan paid $74,869.37 for their medical expenses. *Id.* at 4a, 24a, 37a. Petitioners sued third parties responsible for the accident. *Id.* at 4a, 24a, 36a-37a.

Respondent Mid Atlantic Medical Services, Inc., as the plan's fiduciary, asserted reimbursement and lien rights against any recoveries from the third parties. Pet. App. 3a-5a, 36a, 39a-45a. Respondent also requested petitioners to cooperate with the enforcement of those rights and to sign lien documents. *Id.* at 4a-5a, 40a-44a. In so doing, respondent was acting pursuant to a plan provision requiring that, when a member is injured as a result of the act or omission of a third party and the plan pays benefits for that injury, the plan is subrogated to the member's right to recover damages from the third party. *Id.* at 4a, 38a. The plan provision states that

> [a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse [respondent] net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due [respondent] for benefits paid. * * * [Respondent's] share of the recovery will not be reduced because you * * * ha[ve] not received the full damages claimed, unless [respondent] agrees in writing to a reduction.

J.A. 75. The plan further requires members to "promptly advise [respondent]" of third-party claims and to execute any assignments, liens, or other documents the Company re-

quests. *Ibid.* The plan may withhold benefits until such documents are received. *Ibid.*

Petitioners declined to recognize respondent's asserted rights or sign the documents. Instead, they settled the third-party litigation for $750,000 and placed the proceeds into their investment accounts. Pet. App. 5a-6a, 44a-45a.

2. Following the settlement, respondent sued petitioners under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). That section authorizes a plan fiduciary to bring a civil action—

> (A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan.

29 U.S.C. 1132(a)(3). Respondent sought to enforce the plan's terms requiring reimbursement by, among other things, obtaining restitution of the funds held in petitioners' investment accounts. Pet. App. 6a. The parties stipulated to relevant facts, and respondent filed a motion for summary judgment. *Id.* at 6a, 25a, 36a-45a. Petitioners filed a motion to dismiss, asserting that respondent impermissibly sought monetary damages whereas ERISA permits only "appropriate equitable relief." *Id.* at 6a.

3. The district court granted summary judgment to respondent in relevant part. Pet. App. 24a-35a.[1] The court reasoned that, under *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), respondent sought equitable

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[1] The district court reduced respondent's recovery by about 10% pursuant to the plan term allowing the plan to share the attorney's fees a participant incurs in obtaining a third-party recovery. Pet. App. 15a, 32a. Respondent does not dispute that reduction for attorney's fees. Whether respondent is entitled to attorney's fees under Section 502(g) of ERISA, 29 U.S.C. 1132(g), see Pet. App. 16a-18a, is also not at issue.

restitution that is available under Section 502(a)(3), rather than legal restitution, which is unavailable under that Section. Pet. App. 27a-32a. The court read *Great-West* to permit a plan fiduciary to sue for funds that are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant beneficiary. *Id.* at 30a. Respondent sought specifically identifiable funds, the court explained, because it sought the very funds paid to petitioners by the third-party tortfeasors. *Id.* at 31a. The funds belonged in good conscience to the plan, the court concluded, because the plain language of the plan indisputably requires petitioners to reimburse the plan-paid medical expenses. *Ibid.* The funds were also in petitioners' possession and control, the court reasoned, because they had been placed in petitioners' investment accounts and segregated pending the result of this lawsuit. *Ibid.*; see *id.* at 6a (petitioners agreed "to 'preserve $74,869.37 of the settlement funds'") (quoting 03-2269 Order 1 (D. Md. Aug. 11, 2003)). Accordingly, the court ordered petitioners to reimburse respondent for its medical expenses. *Id.* at 34a-35a.

4. The court of appeals affirmed the district court's grant of summary judgment and the reimbursement award. Pet. App. 1a-19a. Like the district court, the court of appeals read *Great-West* to permit a plan fiduciary to sue under Section 502(a)(3) for funds that are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant beneficiary. *Id.* at 10a-11a. For essentially the same reasons as the district court, the court of appeals concluded that respondent's action satisfied those conditions. See *id.* at 11a-12a. Accordingly, the court held that respondent's action was one for "appropriate equitable relief" under 29 U.S.C. 1132(a). Pet. App. 12a.

SUMMARY OF ARGUMENT

A. Respondent's reimbursement action seeks "appropriate equitable relief" authorized by Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). Under the framework established by *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), a court must determine whether "the relief sought by the plaintiff" is relief that would have typically been available in a court of equity. Applying that rule, the Court in *Great-West* stated that a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or equitable lien, if money or property identified as belonging in good conscience to the plaintiff could be traced to particular funds or property in the defendant's possession. In *Great-West*, the Court held that the reimbursement action did not seek "equitable" relief, because it merely sought to impose personal liability on the defendant for an amount of money owed to the plaintiff.

B. Respondent's action here satisfies *Great-West*'s conditions for "equitable relief". First, respondent seeks to recover specifically identifiable funds—petitioners' settlement proceeds—unlike the fiduciary in *Great-West*, who sought only to impose personal liability on a plan participant for a contractual obligation to pay money. Second, the funds belong in good conscience to the plan because the plan's terms require that recoveries from third parties "must be used to reimburse" respondent for the medical benefits it provided. J.A. 75. Third, and finally, the proceeds of the settlement are clearly traceable to petitioners' investment accounts. The plan's terms thus created an equitable lien that was typically enforceable in equity under principles recognized by this Court and confirmed by a majority of state courts.

C. Petitioners' arguments that the relief is not "equitable" are unpersuasive. There is no requirement in equity for

the plaintiff to trace the money in petitioners' investment accounts back to the funds used by the plan to pay medical expenses; the plaintiff in equity had only to trace the funds to particular funds (here, a portion of the settlement proceeds) that in good conscience belong to the plaintiff and that therefore are subject to the constructive trust or equitable lien the plaintiff seeks to enforce. There is also no requirement that the plan lack an adequate remedy at law to enforce its equitable right to the settlement proceeds and, in any event, the plan lacks an adequate legal remedy.

D. Although traditional principles of equity firmly establish that respondent seeks "appropriate equitable relief" in this case, any remaining doubt on that score should be resolved in favor of enforcement of the plan's terms. Because the Section 502(a)(3) inquiry under *Great-West* turns on the relief traditionally available in equity in analogous cases, courts may face cases in which there is uncertainty, or divergent views among courts and commentators, about the authority of equity courts or the precise line dividing law and equity. In such cases, courts should exercise caution in relying on one, rather than another, case or line of authority to foreclose relief under Section 502(a)(3). Instead, in light of Congress's appeal to equity in Section 502(a)(3) and equity's historic role in providing complete relief to further statutory purposes, courts should resolve doubts in favor of ERISA's core policy to provide effective enforcement of lawful plan terms that comply with ERISA. Congress chose to leave it largely to plan sponsors to provide benefits and impose plan conditions in accordance with their own circumstances and best judgment, so that they would be encouraged to form ERISA plans and provide benefits to employees. Restrictions on the enforceability of lawful and valid plan terms disserve that purpose, as this case would amply demonstrate if petitioner's argument is accepted. Doubtful questions about the

scope of "equitable relief" in Section 502(a)(3) should accordingly be resolved in favor of enforcement of lawful plan terms—in this case, the plan's reimbursement provision.

E. Petitioners' contention that reimbursement actions are not "appropriate" equitable relief is mistaken. Such actions are fair to the particular parties from whom reimbursement is sought, because those parties receive precisely what they were promised: immediate payment of medical benefits by the plan subject to a requirement to reimburse the plan from a later recovery. Such actions also preserve plan assets for the benefit of all members generally, and reasonably preclude participants and beneficiaries from inequitable and wasteful conduct in obtaining windfall recoveries in the event of an accident—once from the plan and then again in a third-party tort recovery of those same costs.

The Court need not consider petitioners' arguments about the "make whole" doctrine, under which an insurer cannot recover its payments of an insured's medical expenses from an insured's third-party recovery until the insured is "made whole" for his or her injuries. Petitioners failed to raise that issue in the court of appeals or in the certiorari petition, and they failed to establish as a factual matter that their $750,000 tort recovery is less than the amount necessary to make them whole. This case therefore properly presents only the more basic question whether a plan may ever bring a Section 502(a)(3) action to enforce a valid reimbursement provision.

In any event, because there is nothing in ERISA itself that imposes limitations on plan terms with respect to this issue, the terms of the plan should control. Here, the terms of the plan are clear that the plan is entitled to recover the entire amount of the medical expenses it paid (less its proportional share of attorney's fees), and the $750,000 recovery from the third party greatly exceeds the plan's $74,869.37 claim for recovery.

ARGUMENT

SECTION 502(a)(3) AUTHORIZES AN ACTION TO ENFORCE PLAN TERMS REQUIRING REIMBURSEMENT OF PLAN-PAID MEDICAL EXPENSES OUT OF FUNDS A PARTICIPANT RECOVERS FROM A THIRD PARTY RESPONSIBLE FOR THE UNDERLYING ILLNESS OR INJURY

Section 502(a)(3) of ERISA authorizes a participant, beneficiary, or fiduciary to bring a civil action—

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. 1132(a)(3). There is no dispute that respondent is a fiduciary and that the plan's terms require petitioners to use their $750,000 third-party tort recovery to reimburse respondent for $74,869.37 in plan-paid medical expenses, reduced by a proportionate share of the attorney's fees petitioners incurred in their third-party litigation. There is also no dispute that petitioners failed to reimburse respondent or to sign the lien documents that the plan required them to sign. See J.A. 75. The sole issue is whether respondent may maintain this action at all as one for "appropriate equitable relief" authorized by Section 502(a)(3) to redress petitioners' violations of the plan or to enforce the terms of the plan.

A. Under *Great-West*, An Action For Equitable Restitution Is An Action For "Equitable Relief" Authorized By Section 502(a)(3)

This Court has construed "equitable relief" under Section 502(a)(3) to mean "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens* v.

Hewitt Assocs., 508 U.S. 248, 256 (1993).[2] The Court has further explained that claims for "restitution" may be either legal or equitable, depending "on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (alteration in original).

In *Great-West*, this Court explained that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." 534 U.S. at 213 (discussing 1 Dan B. Dobbs, *Law of Remedies* § 4.3(1), at 587-588 (2d ed. 1993) (Dobbs); Restatement of Restitution § 160 cmt. a at 641-642 (1937), and 1 George E. Palmer, *Law of Restitution* (1978) § 1.4, at 17, § 3.7, at 262 (1978) (Palmer)). In those circumstances, a court of equity could "order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Great-West*, 534 U.S. at 213; see also Restatement of Restitution § 161 cmt. b at 651 (where an equitable lien is on a fund, "it is enforced by a direction to pay the claimant out of the fund"). Where those circumstances are not present—*i.e.*, where the claim is that plaintiffs merely are "entitled to *some* funds for benefits that they conferred"—the suit seeks the legal remedy of "the imposition of personal liability for the benefits that [plaintiffs] conferred upon [defendant]." *Great-West*, 534 U.S. at 214.

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[2] It has been argued that mandamus was historically a legal, not equitable remedy. John H. Langbein, *What ERISA Means by "Equitable": the Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1353-1354 (2003). None of this Court's ERISA cases have turned on the proper classification of mandamus.

Under that analysis, Section 502(a)(3) permits a plan fiduciary to bring an action for equitable restitution where (1) the fiduciary seeks specific money or property, (2) the money or property belongs in good conscience to the plan, and (3) the money or property can clearly be traced to money or property in the defendant's possession. See Pet. App. 10a-13a. If those conditions are satisfied, the court can award the fiduciary title to the money or property at issue or a security interest in it, and require that the money or property be transferred to the fiduciary. See *Great-West*, 534 U.S. at 213-214; Restatement of Restitution § 161 cmt. b at 651.

In *Great-West* itself, the Court determined that the conditions for equitable restitution were not satisfied and that Section 502(a)(3) therefore did not permit the action for reimbursement at issue there. The plan terms in that case gave the plan (1) a first lien on any recovery from a third party, and (2) also provided that, "[i]f the beneficiary recovers from a third party and fails to reimburse the Plan, 'then he will be personally liable to [the Plan] . . . up to the amount of the first lien.'" 534 U.S. at 207 (citation omitted). In *Great-West*, the fiduciary attempted to enforce the plan terms by suing for a money judgment to recover settlement funds *after* the settlement proceeds had been distributed and were "not in [the beneficiaries'] possession." *Id.* at 214; see *id.* at 208-209. In those circumstances, the Court held that the fiduciary sought, "in essence, to impose personal liability on [the beneficiaries] for a contractual obligation to pay money—relief that was not typically available in equity." *Id.* at 210; see *id.* at 213 (quoting 1 Dobbs § 4.2(1), at 571, for the proposition that a plaintiff had a right to restitution *at law* when the plaintiff had grounds for recovering money but "'could *not* assert title or right to possession of particular property'").

B. Unlike In *Great-West*, Respondent's Action Seeks Equitable Restitution Because It Seeks To Recover Specifically Identifiable Funds That Belong In Good Conscience To The Plan Rather Than To Impose Personal Liability On Petitioners

In this case, respondent satisfies all three of the conditions for equitable restitution identified in *Great-West*.

1. First, respondent seeks to recover specifically identifiable funds, *i.e.*, $74,869.37 of the proceeds of petitioners' third-party settlement. Pet. App. 11a, 31a. Respondent is therefore unlike the fiduciary in *Great-West*, who sought, "in essence, to impose personal liability on [the beneficiaries] for a contractual obligation to pay money," 534 U.S. at 210, and "could *not* assert title or right to possession of particular property." *Id.* at 213 (citation omitted).

2. Second, those settlement proceeds belong in good conscience to the plan. "[I]t is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914); see *Walker* v. *Brown*, 165 U.S. 654, 664-665 (1897). As a prominent treatise, cited by the Court in *Great-West*, explains:

> It is well settled that an agreement * * * to assign * * * or to affect property not yet in existence, * * * or property to be acquired by [the promisor] in the future, although * * * it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so * * * acquired at a subsequent time.

4 John N. Pomeroy & Spencer W. Symons, *Equity Jurisprudence*, § 1236, at 699-700 (1941) (footnote omitted); see *id.* at 701 (giving as "common examples" mortgages or leases,

"which purport to embrace future-acquired property of the mortgagor or lessee," and which, "although creating no legal interest in the property thus described, constitute an equitable lien"); *Peugh* v. *Porter*, 112 U.S. 737, 742 (1885) (noting, in rejecting argument that a claimant "has no equitable lien," that "there were words in the agreement * * * of express transfer and assignment of the very fund now in dispute, though not then in existence, which, in contemplation of equity, is not material").

That principle applies here because the plan terms expressly provide that "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) *must be used* to reimburse the Company" for plan-paid medical benefits. J.A. 75 (emphasis added). Although the plan terms gave the plan no legal interest in petitioners' third-party recovery, they created an equitable interest in the recovery that would have been enforceable in a court of equity. In *Barnes*, the court held that a contract to pay an attorney out of the hoped-for recovery on a claim created a lien on the recovery enforceable in equity. 232 U.S. at 121 ("the moment the fund was received the contract attached to it"). As the Court explained in similar circumstances in *Wylie* v. *Coxe*, 56 U.S. (15 How.) 415, 420 (1853), it "is a sufficient ground for an equity jurisdiction" that "[t]he fund was looked to" in the contract, and "not the personal responsibility of the owner of the claim."[3]

Indeed, the principle that an insured must reimburse an insurer out of a third-party recovery has deep roots in equity. This Court has long recognized, in the context of property

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[3] For this reason, petitioners err in asserting (Br. 26) that respondent has no equitable action because "at the time the policyholder agrees to the plan terms or accepts medical benefits from the plan, she possesses no third-party recovery which she can appropriate to the plan." As the authorities cited in the text make clear, a person may grant an equitable lien on property that has not yet come into existence or into her possession.

insurance, that an insurer is subrogated to the rights of the insured to recovery from the third party. See *Hall & Long* v. *The Railroad Cos.*, 80 U.S. (13 Wall.) 367, 370 (1871) (right of insurer who "has indemnified the owner for the loss" to owner's claim against primarily liable third party "rests upon familiar principles of equity"); *Garrison* v. *Memphis Ins. Co.*, 60 U.S. (19 How.) 312, 317 (1856). The basis for that right is that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss." *Hall & Long*, 80 U.S. (13 Wall.) at 371 (citation omitted). Possessing an "equitable title" means that when the insurer pays for a property loss and the insured recovers from a third party responsible for the loss, the insured "holds [the amount recovered] in trust for the insurers, and they may recover it from him by a suit in equity." *Monmouth County Mut. Fire Ins. Co.* v. *Hutchinson*, 21 N.J. Eq. 107, 117 (N.J. 1870).[4]

To be sure, there was at one time some question about the extent to which a right of subrogation would be recognized in personal injury, as opposed to property damage, actions. But by the time ERISA was enacted in 1974, Pub. L. No. 93-406, 88 Stat. 832-833, a large majority of state courts to address the issue had recognized an insurer's subrogation or reimbursement rights under policies of medical or automobile

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[4] Although *Hall & Long* and *Garrison* involved suits against the third party rather than the insured, the Court in *Garrison* also addressed the situation where the third party (as here) had already settled with the insured. The Court cited a case in which "an insurer enforced a lien on a judgment recovered by the assured for a loss," and noted that such cases "show that an insurer may apply to equity whenever an impediment"—*i.e.*, the satisfaction of the claim by the third party—"exists to the exercise of his legal remedy in the name of the assured." 60 U.S. (19 How.) at 317.

insurance.[5] Those courts had thus rejected arguments, accepted by a minority of courts, that permitting subrogation or reimbursement would violate common-law prohibitions against assigning or splitting a personal-injury cause of action. See, *e.g.*, *Rinehart* v. *Farm Bureau Mut. Ins. Co.*, 524 P.2d 1343, 1344-1346 (Idaho 1974) (discussing cases).[6] Those

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[5] See *Rinehart* v. *Farm Bureau Mut. Ins. Co.*, 524 P.2d 1343, 1345 & n.2 (Idaho 1974); *Alabama Farm Bureau Mut. Cas. Ins. Co.* v. *Anderson*, 263 So. 2d 149, 151-154 (Ala. App.), cert. denied, 263 So. 2d 155 (Civ. 1972); *Blocker* v. *National Disc. Ins. Co.*, 493 P.2d 825, 826 (Okla. 1972); *Harris* v. *Huval Baking Co.*, 265 So. 2d 783, 784-786 (La. Ct. App.), writ denied, 267 So. 2d 210 (La. 1972); *Inel* v. *Travelers Indem. Co.*, 281 N.E.2d 919, 921 (Ind. Ct. App. 1972); *Jacobson* v. *State Farm Mut. Auto. Ins. Co.*, 491 P.2d 168, 170 (N. M. 1971); *Foundation Reserve Ins. Co.* v. *Cody*, 458 S.W.2d 214, 216-217 (Tex. Civ. App. 1970); *Geertz* v. *State Farm Fire & Cas.*, 451 P.2d 860, 862 (Or. 1969); *Travelers Indem. Co.* v. *Rader*, 166 S.E.2d 157, 159-162 (W. Va. 1969); *State Farm Mut. Ins. Co.* v. *Farmers Ins. Exch.*, 450 P.2d 458, 458-459 (Utah 1969); *Higgins* v. *Allied Am. Mut. Fire Ins. Co.*, 237 A.2d 471, 472 (D.C. 1968); *Shipley* v. *Northwestern Mut. Ins. Co.*, 428 S.W.2d 268, 270 (Ark. 1968); *National Union Fire Ins. Co.* v. *Grimes*, 153 N.W.2d 152, 153-155 (Minn. 1967); *Hospital Serv. Corp.* v. *Pennsylvania Ins. Co.*, 227 A.2d 105, 109 (R.I. 1967); *Demmery* v. *National Union Fire Ins. Co.*, 232 A.2d 21, 24-26 (Pa. Super. 1967); *Busch* v. *Home Ins. Co.*, 234 A.2d 250, 251-252 (N.J. Super. Ct. App. Div. 1967); *Associated Hosp. Serv., Inc.* v. *Milwaukee Auto. Mut. Ins. Co.*, 147 N.W.2d 225, 226-227 (Wis. 1967); *Travelers Indem. Co.* v. *Godfrey*, 230 N.E.2d 560, 562-563 (Ohio Ct. Common Pleas 1967); *Wilson* v. *Tennessee Farmers Mut. Ins. Co.*, 411 S.W.2d 699, 701-702 (Tenn. 1967); *DeCespedes* v. *Prudence Mut. Cas. Co.*, 193 So. 2d 224, 226-228 (Dist. Ct. App. 1966), aff'd, 202 So. 2d 561 (Fla. 1967); *Bernardini* v. *Home & Auto. Ins. Co.*, 212 N.E.2d 499, 501 (Ill. App. Ct. 1965); *Miller* v. *Liberty Mut. Fire Ins. Co.*, 264 N.Y.S.2d 319, 321-323 (N.Y. Sup. Ct. 1965); cf. *Michigan Med. Serv.* v. *Sharpe*, 64 N.W.2d 713, 714 (Mich. 1954) (recognizing subrogation but denying equity jurisdiction because plaintiff had an adequate remedy at law).

[6] The prohibitions against assignment or splitting a personal-injury cause of action were not based on any principles unique to equity. See, *e.g.*, *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 320 (1927); *Baird* v. *United States*, 96 U.S. 430, 432 (1877); *Comegys* v. *Vasse*, 26 U.S. (1 Pet.) 193, 213 (1828). Thus, even the rationale adopted by the minority of courts does not suggest that Section 502(a)(3)'s grant of authority to award "equitable" relief imposes

decisions confirm that, when an ERISA plan specifically requires a third-party recovery to be used to reimburse the plan for medical benefits it paid, as here, the proceeds in good conscience belong to the plan up to the amount that it has expended, and the obligation to transfer the proceeds to the plan may be enforced in equity.

3. Third, the equitable doctrine of tracing permits respondent to recover the settlement proceeds it requests from petitioners' investment accounts because petitioners deposited the proceeds into their investment accounts. Pet. App. 6a, 31a. "Tracing was a creation of equity and has remained almost entirely the sole province of equity." 1 Palmer § 2.14, at 177. Tracing permits a court to recover funds after they have been commingled with other funds by giving the claimant "an equitable lien on the entire commingled fund, which continues as to any balance remaining in the fund." *Id.* § 2.16, at 196; see, *e.g.*, *National Bank* v. *Insurance Co.*, 104 U.S. 54, 66-72 (1881) (commingled bank account). *A fortiori*, tracing permits respondent to recover the funds from petitioners' investment accounts, which they agreed to preserve during this lawsuit.

C. Petitioners' Arguments That The Relief Sought In This Case Is Not Equitable Are Without Merit

Petitioners admit that "as a matter of fairness" it is "perhaps true" that the funds in question belong in good conscience to the plan. Pet. Br. 21. They argue, however, that, to obtain equitable relief the plan must also show that the funds can be traced back to the funds used by the plan to pay medical benefits, that the plan lacks an adequate legal remedy, and that the plan fits within a specific exception to a purported general rule in equity prohibiting recovery of money

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an implied limitation on the availability of relief to enforce a constructive trust or equitable lien on a recovery for personal injuries.

based on a contract. *Id.* at 19-30. None of those arguments is correct.

1. No rule of equity requires the plan to show that its payments of benefits can be traced through petitioners' tort recovery from a third party and into petitioners' investment accounts. A court in equity could impose a constructive trust "upon any identifiable kind of property or entitlement in the defendant's hands if, in equity and conscience, it belongs to the plaintiff." 1 Dobbs § 4.3(2), at 589-590. Tracing allows a court to impose a constructive trust or equitable lien on property even after it has been transferred to third parties, so long as they are not bona fide purchasers. *Id.* at 590.

a. This Court's decision in *Barnes* illustrates those principles. In *Barnes*, a law firm recovered one-fourth of a settlement pursuant to a contingent fee agreement. 232 U.S. at 119. The appellant, Mrs. Barnes, obtained that law firm's interest. See *ibid.* A second law firm claimed one-third of the first law firm's recovery pursuant to an agreement under which the second law firm would be paid out of the recovery. *Id.* at 119, 121. This Court held that the second law firm had a lien on the recovery, *id.* at 121-122, and "[h]aving a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes." *Id.* at 123. The Court thereby allowed the second law firm to follow property and recover it based on the firm's equitable lien. The Court did not require the second law firm to show that the money it sought to recover could be traced back to funds that firm used to pay expenses it incurred pursuant to its agreement with the first law firm. It was sufficient that the first law firm, and then Mrs. Barnes, had received money from *the client's* settlement, a portion of which, in equity and good conscience, belonged to the second law firm.

Under similar reasoning, the plan here need only show that the funds it seeks to recover can be traced back to the

property on which it has an equitable lien, *i.e.*, the funds petitioners obtained in their third-party settlement, which petitioners previously agreed "must be used" to reimburse the plan. J.A. 75. Indeed, this case is simpler than *Barnes*, because the settlement funds have not been transferred by petitioners to a third party, but are still being held by petitioners and preserved for payment to respondent if it prevails in this case. Pet. App. 6a. The plan does not have to trace the funds petitioners received in settlement back to the funds the plan paid for medical expenses. Consistent with *Great-West*, a plan fiduciary's action for equitable restitution need only seek specific money or property that is in the defendant's possession and that belongs in good conscience to the plaintiff.

b. Petitioners' own authorities are consistent with the rule that a constructive trust or equitable lien need not arise from a plaintiff's claim to property that once belonged to the plaintiff, though of course in some cases it will so arise. For example, the section of the Dobbs treatise cited by petitioners (Br. 19-20) does not purport to set forth a general limitation on all constructive trusts. Instead, under the general heading "[t]racing," that section simply illustrates how a constructive trust operates to "allow[] the plaintiff the gain produced by his property." 1 Dobbs § 4.3(2), at 592. The treatise states that "[e]specially when the defendant has taken money, tracing is difficult" and involves "a series of special rules for tracing money." *Id.* at 592-593. The treatise concludes that, under those tracing rules, "[i]f the tracing is incomplete, the rule that requires a *res* is invoked and the constructive trust is denied." *Id.* at 593. The quoted passage thus establishes that "when the defendant has taken money" belonging to the plaintiff, the plaintiff may obtain gains produced by that money only if the plaintiff can trace the gains back to the money the defendant obtained from the plaintiff. The use of that illustration says nothing about other forms of construc-

tive trusts that do *not* arise from a defendant's misappropriation of money originally belonging to the plaintiff, and it certainly does not purport to limit constructive trusts or equitable liens to cases involving such misappropriations. Thus, where, as here, the constructive trust or equitable lien is imposed in the first instance on funds received by a plan beneficiary from a third party, it is necessary only to trace money in the hands of a subsequent transferee back to those funds received by the beneficiary.

Petitioners similarly cite for the same proposition (Br. 20) the Restatement (Second) of Trusts § 202, at 444 (1959), which states that "[w]here the trustee by the wrongful disposition of trust property acquires other property," the acquired property may be subjected to a constructive trust or equitable lien only if it is "the product of the trust property" and "can be traced." That Restatement section, which is entitled "Following Trust Property into Its Product," also merely states the rule for tracing trust property that is subject to a constructive trust because it was misappropriated, not any rule defining the requirements for constructive trusts or equitable liens that arise in other circumstances.

In short, petitioners' authorities do not purport to define any general rule that *all* varieties of constructive trust or equitable lien must originate in property that was in the plaintiff's possession or to which the plaintiff had legal title. To the contrary, the authorities that do address that question make clear that neither wrongdoing nor the existence of property originally belonging to the plaintiff is necessary. See *Moore* v. *Crawford*, 130 U.S. 122, 128 (1889) ("Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably enti-

tled to the same, although he may never, perhaps, have had any legal estate therein.") (internal quotation marks and citation omitted); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 251 (2000) ("that a transferee was not 'the original wrongdoer' does not insulate him from liability [under Section 502(a)(3)] for restitution"); 1 Dobbs § 4.3(3), at 602 ("Neither remedy [*i.e.*, constructive trust or equitable lien] is limited to cases of wrongdoing or dishonorable conduct by the defendant."). And that principle is consistent with the recognition that a lien can be triggered not just by the defendant's misappropriation of funds or property from the plaintiff, but also by the receipt of funds or property from a third party that, based on a prior obligation, belong to the plaintiff.[7]

2. Likewise, there is no requirement that the plan lack an adequate remedy at law to bring an action for equitable restitution. Although certain claims in equity could be dismissed if the chancellor thought the plaintiff would have an adequate remedy at law, "[t]he constructive trust claim is different" because "[i]t is not a claim based on a legal right. On the contrary, constructive trusts are needed because legal title is in the defendant." 1 Dobbs § 4.3(2), at 595. Similarly, the bare availability of some legal remedy is no bar to equity jurisdiction to enforce an equitable lien. As this Court has explained, "[t]here may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for [equity] jurisdiction." *Wylie*, 56 U.S. (15 How.) at 420.

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[7] Petitioners' retention of the settlement proceeds, with knowledge of the plan's reimbursement right, is in any event wrongful. Accordingly, even if wrongful conduct were required, the plan could trace the settlement proceeds into petitioners' investment accounts. See *Moore*, 130 U.S. at 128 ("Fraud * * * in the sense of a court of equity properly includes all acts, omissions, and concealments which involve breach of legal or equitable duty * * * or by which an undue and unconscientious advantage is taken of another.").

Moreover, even if lack of an adequate legal remedy were required, that condition is satisfied here because the plan lacks an adequate legal remedy. Under *Great-West* and *Mertens*, a plan cannot sue under ERISA for legal relief. And because of the breadth of ERISA's preemption provision, 29 U.S.C. 1144(a), and the exclusivity of the causes of action under Section 502(a) of ERISA, see, *e.g.*, *Aetna Health, Inc.* v. *Davila*, 542 U.S. 200, 208-209 (2004), a state-law cause of action by a plan against a participant or beneficiary to enforce a reimbursement provision of an ERISA plan would appear to be preempted on the ground that the state law and the cause of action "relate to" the plan. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-60 (1990) (state law prohibiting subrogation or right of reimbursement by plan preempted by ERISA); *Funk Mfg. Co.* v. *Franklin*, 927 P.2d 944, 947-949 (Kan. 1996) (reimbursement action preempted); *Liberty Northwestern Ins. Corp.* v. *Kemp*, 85 P.3d 871, 877-881 (Or. Ct. App.) (same), review denied, 93 P.3d 71 (Or. 2004); *MEBA Med. & Benefits Plan* v. *Lago*, 867 So. 2d 1184, 1188-1190 (Fla. Dist. .Ct. App. 2004) (same); but see *Providence Health Plan* v. *McDowell*, 385 F.3d 1168, 1171-1173 (9th Cir. 2004) (ERISA does not preempt plan's state-law reimbursement action), cert. denied, 125 S. Ct. 1726 and 1735 (2005); *Hamrick's, Inc.* v. *Roy*, 115 S.W.3d 468, 474-476 (Tenn. Ct. App. 2003) (similar). Prohibiting a plan's action for equitable reimbursement under Section 502(a)(3) of ERISA would therefore likely mean that plan terms calling for reimbursement are effectively unenforceable in law *or* equity.[8]

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[8] Petitioners also argue that the plan could have intervened in their state-court suit in California to assert subrogation rights against the third parties. Pet. Br. 21 n.8, 29. It is not at all clear that a plan fiduciary can intervene in a state-court tort suit, however, particularly in a State such as California that does not permit subrogation in personal injury cases. See *Great-West*, 534 U.S. at 220 (expressing no opinion on permissibility of intervention); *Fifield Manor*

3. a. Finally, the plan's request for equitable reimbursement, through enforcement of a constructive trust or equitable lien on the proceeds of petitioners' third-party settlement, cannot be defeated by characterizing the plan's claim as a legal claim for money based on a contract, *i.e.*, the plan's reimbursement provision. Pet. Br. 24-27. As discussed above, this Court has recognized "one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Barnes*, 232 U.S. at 121. The Court applied that principle to a settlement fund in *Barnes*, thus establishing that a claim for money based on a contract is enforceable in equity when the contract requires conveyance of a specific fund of money. See *Wylie*, 56 U.S. (15 How.) at 420. In this case, the plan's terms require that third-party settlements "must be used" to reimburse the plan. J.A. 75. Petitioners' reliance (Br. 26) on *Taylor* v. *Wharton*, 43 App. D.C. 104 (D.C.), cert. denied, 238 U.S. 631 (1915), is therefore misplaced because in *Taylor* "there was no appropriation of the fund and no agreement that [the plaintiff] should be paid out of it." 43 App. D.C. at 109. Accordingly, even if the plan's action is characterized as contractual in nature—in the sense of being based on petitioners' contractual undertaking to reimburse the plan out of funds they received from a third-party tortfeasor—that does not defeat respondent's right to equitable reimbursement.

b. Contrary to petitioners' suggestion (Br. 22), this Court's decision in *Gaines* v. *Miller*, 111 U.S. 395 (1884), does

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v. *Fonston*, 354 P.2d 1073, 1076-1079 (Cal. 1960) (no subrogation). Moreover, in cases in which the beneficiary obtains a settlement of a claim before suit is filed or in which the insurer does not find out about the suit until it has already been settled or otherwise resolved, there would be no suit in which the plan could intervene. The availability of an ERISA remedy, therefore, should not turn on that fortuity.

not require a person with an equitable claim to particular funds to recover the money through an action at law for assumpsit, rather than an action in equity. In *Gaines*, a claimant sued in equity to obtain the proceeds from a sale of land, which she had ratified, from her father's estate. *Id.* at 397. This Court held that the court had no jurisdiction in equity over the case, explaining that "[t]here is no averment in the bill of complaint of any ground of equity jurisdiction" because "[t]he appellant has no lien on [the deceased's] estate and avers none." *Id.* at 398. It was in that context that the Court in *Gaines* commented that it was, "therefore, simply a case of money had and received" that is recoverable by an "adequate and complete" remedy at law. *Id.* at 397-398. See also *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49 & n.7 (1989) (bankruptcy action to set aside fraudulent transfer is characterized as a legal suit for money where bankruptcy trustee did not request a specifically equitable form of relief).

In this case, the plan has specifically asserted an equitable lien on the proceeds of the third-party settlement petitioners received, and the plan is entitled to such a lien because its terms provide that the third-party recovery "must be used" to reimburse the plan. J.A. 75. Accordingly, unlike in *Gaines*, where the plaintiff did not have, and did not assert, such a lien, the plan in this case asserts an equitable lien and would have been entitled to enforce it in equity at the time of the divided bench.

c. Similarly, there is no good reason for the Court to deny enforcement of the governing plan terms based on petitioners' argument that a court in equity would generally refuse to enforce a contractual lien, but rather would only "imply a lien when an intended contractual lien could not be enforced at law because of some technical defect." Pet. Br. 27. In many of the cases cited above, the sole source for the equitable lien or constructive trust was a contractual undertaking that a

particular fund should be the property in whole, or in part, of the plaintiff. See *Barnes*, 232 U.S. at 121; *Walker*, 165 U.S. at 664-665; *Peugh*, 112 U.S. at 742; *Wylie*, 56 U.S. (15 How.) at 420; see also *Fourth St. Nat'l Bank* v. *Yardley*, 165 U.S. 634, 653 (1897) (based on circumstances of a contract, concluding that "it was intended that the particular fund * * * should be transferred and appropriated *pro tanto*" for the purpose of paying a check, and that therefore relief on the bill in equity to enforce the resulting equitable lien should be granted). In any event, adopting petitioners' rule for ERISA plans would lead to the anomalous result that a poorly drafted plan reimbursement term could be enforced under Section 502(a)(3), while a clearly written one could not.

D. This Court Should Resolve Any Doubts About The Scope Of "Equitable Relief" Under Section 502(a)(3) In Favor Of Its Availability To Enforce Valid Plan Terms

As demonstrated above, applying traditional principles of equity yields the result that the action in this case may be brought under Section 502(a)(3). Insofar as there remains any doubt, however, it should be resolved in favor of permitting actions to enforce legally valid ERISA plan terms.

Not all questions about the precise scope of equity jurisdiction or about the precise dividing line between legal and equitable authority reached a clear or definitive resolution before the fusion of law and equity in the federal system. See Fed. R. Civ. P. 2. Nor is there any reason to believe that all such questions have since been resolved once and for all by doctrines that perpetuate the distinction. When Congress authorized actions for "equitable relief" in Section 502(a)(3) of ERISA in 1974, it surely incorporated the kind of flexibility in equitably remedying injustice that characterized the equitable side of the bench. Accordingly, care should be exercised before assuming that any single case or other authority is dispositive in setting forth limits on the scope of "equitable

relief" under ERISA, especially when other cases or authorities point in the opposite direction.

It is also entirely consistent with standard equity practice to construe and apply equitable jurisdiction in accord with the policies embodied in particular legislation. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief *in light of the statutory purposes*." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) (emphasis added); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see *Great-West*, 534 U.S. at 228 (Ginsburg, J., dissenting). When Congress in Section 502(a)(3) authorized courts to grant "appropriate equitable relief," Congress thus intended that if particular relief that is appropriate in the circumstances can fairly be analogized to relief that was within the outer boundaries of the authority of courts of equity, it should be available to advance ERISA's statutory purposes. Congress deliberately entrusted to the federal courts the authority in actions under Section 502 to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). Section 502(a)(3) should be construed to confer on the courts a corresponding measure of flexibility in drawing on equitable principles to fashion appropriate relief.

A core purpose of ERISA is to authorize reasonably efficient and effective enforcement of plan terms that comply with the statute. In enacting ERISA, Congress intended generally to promote the interests of participants and beneficiaries in employee benefit plans, 29 U.S.C. 1001(b), but Congress stopped short of requiring employers to establish such plans. *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Congress also excluded welfare plans, defined to include plans that provide health benefits, 29 U.S.C. 1002(1), from

ERISA's minimum vesting, participation, and funding requirements applicable to pension plans. 29 U.S.C. 1051, 1081(a); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Because, in general, "ERISA itself 'does not regulate the substantive content of welfare-benefit plans,'" an employer "is 'generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare pla[n].'" *Inter-Modal Rail Employees Ass'n* v. *Santa Fe Ry.*, 520 U.S. 510, 515 (1997)(citations omitted).[9] Congress gave employers such flexibility because requiring the vesting of welfare benefits "would seriously complicate the administration and increase the cost of plans." *Inter-Modal*, 520 U.S. at 515 (quoting S. Rep. No. 383, 93d Cong., 1st Sess. 51 (1973)). Ultimately, limiting the enforceability of permissible plan terms would likely decrease the benefits employers choose to make available to employees.

Accordingly, enforcing plan terms that are lawful under ERISA itself—such as the term in this case requiring reimbursement—substantially furthers Congress's overall purpose of encouraging sponsors to form ERISA plans and thereby encouraging employers to provide benefits to employees consistent with the statute. By contrast, prohibiting reimbursement or making reimbursement difficult or impossible to enforce would impose a restriction on the design and implementation of plans that Congress did not include in ERISA. It would pressure self-insured plans, the kind at issue here, Pet. App. 37a, either to increase premiums or reduce benefits. See *FMC Corp.*, 498 U.S. at 61-65 (ERISA preempts state anti-subrogation law as applied to self-insured

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[9] If an employer or other plan sponsor decides to provide health benefits, ERISA does limit their ability under certain circumstances to exclude individuals from enrolling in the plan and to exclude certain types of coverage. See 29 U.S.C. 1181-1191c. Those provisions are not at issue here.

plans, but not insured, plans).[10] And, notwithstanding the contentions of amicus (Ass'n of Trial Lawyers of Am. Br. 24-27), limiting the ability of plans efficiently to enforce reimbursement provisions necessarily imposes higher costs on insurers and thus tends to increase the costs (and decrease the benefits) of insured plans as well.[11]

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[10] That is because an employer who self-insures directly reduces its costs by recovering those costs from a third-party. For a small plan with a large claim, or a large plan with many claims, the ability to recover medical benefits payments could therefore make a substantial difference in the plan's ability to pay for other claims. In any event, the recent flurry of litigation about reimbursement—including this case and two others this Term presenting reimbursement questions in different contexts, see *Arkansas Dep't of Health & Human Servs* v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005) (Medicaid); *Empire Healthchoice Assurance* v. *McVeigh*, cert. granted, No. 05-200 (Jan. 6, 2006) (Federal Employees Health Benefits Act (FEHBA)) —suggests that substantial sums are at stake. Because reimbursement requirements are common in other contexts, including Medicare, Medicaid, FEHBA, and private insurance, ERISA plans should not be uniquely foreclosed from enforcing them.

[11] State laws limiting reimbursement may of course apply to insured ERISA plans if those state laws are directed to insurance. See *FMC Corp.*, 498 U.S. at 60-61 ("no dispute" that Pennsylvania anti-subrogation law, as applied to insured plans, is saved from preemption under ERISA's insurance savings clause, 29 U.S.C. 1144(b)(2)(A)); *Singh* v. *Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir.) (Maryland anti-subrogation law is saved), cert. denied, 540 U.S. 1073 (2003); *Medical Mut.* v. *deSoto*, 245 F.3d 561, 573 (6th Cir. 2001) (same for California law); cf. *Levine* v. *United Health Care Corp.*, 402 F.3d 156, 165-166 (3d Cir.) (New Jersey law is not saved because it is not directed at insurance), cert. denied, 126 S. Ct. 747 (2005). Thus, with respect to insured plans, the States retain control of the decision whether a plan term requiring reimbursement is a legal and enforceable plan term. The Department of Labor estimates that ERISA covers approximately 2.5 million job-based health plans and 135 million participants and beneficiaries, and that 300,000 of these plans, covering 78 million individuals, are self-insured. Employee Benefits Sec. Admin., United States Dep't of Labor, *Fact Sheet; Association Health Plans* (Apr. 2005) <http://www.dol.gov/ebsa/newsroom/fsahp.html>.

E. The Relief Sought In This Case Is Appropriate And Consistent With ERISA's Purposes

This Court has not defined when relief is "appropriate" under Section 502(a)(3), which the Court has described as a "catchall" provision that acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996).[12] The Court has instructed the lower courts, however, to "keep in mind the 'special nature and purpose of employee benefit plans.'" *Id.* at 515 (quoting *Pilot Life Ins.*, 481 U.S. at 54). In this case, the relief respondent seeks is "appropriate" because it is consistent with the nature and purposes of an ERISA benefit plan.

1. As explained above, permitting the equitable reimbursement action at issue here is "appropriate" because it gives effect to Congress's choice to allow an employer to decide whether to offer a health benefits plan and, in general, how to structure the kinds of benefits offered. It helps a fiduciary satisfy his obligation "to preserve assets to satisfy future, as well as present, claims" and "to take impartial account of the interests of all beneficiaries." *Varity*, 516 U.S. at 514. The equitable reimbursement action is also fair to participants and beneficiaries who obtain a tort recovery, because it provides them with precisely what they were promised: immediate payment of medical benefits by the plan followed by reimbursement in the event of a third-party recovery. See *Great-West*, 534 U.S. at 210 (prohibiting reimburse-

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[12] Title I of ERISA uses the term "appropriate" in a number of places to describe available relief, see 29 U.S.C. 1024(a)(5)(C), 1109(a), 1132(a)(2), (4), (5), (8) and (9), but does not define the term. The dictionary definition offers little guidance. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 (1983) (difficult to draw meaningful guidance from term "appropriate," "which means only 'specially suitable: fit, proper'") (quoting *Webster's Third New Int'l Dictionary* 106 (1976)).

ment action under Section 502(a)(3) that imposed personal liability). Finally, precluding actions for reimbursement would permit and encourage participants and beneficiaries to obtain double recoveries for medical costs—once from the plan and once in the tort recovery. Enforcing plan terms calling for reimbursement would eliminate that inequitable and wasteful result.

2. Petitioners argue that reimbursement in this case is not "appropriate," because "no determination has ever been made that any of the $750,000 recovered by [petitioners] was compensation for past medical expenses that were paid by [respondent]." Pet. Br. 34. Petitioners thus advocate a "make whole" theory, according to which an insurer may not obtain subrogation or reimbursement from a third-party tort recovery until the insured has been made whole for all other injuries. See, *e.g.*, *Copeland Oaks* v. *Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) (applying "make whole" rule as ERISA default rule in absence of clear contractual provision to the contrary). In petitioners' view, without such a "make whole" showing, a court could not conclude that the $750,000 was "an unjust enrichment which has accrued to [petitioners]" that can be awarded as "appropriate equitable relief." Pet. Br. 34.[13]

This Court need not consider petitioners' argument. They failed to establish in the district court that their $750,000 tort recovery is less than a "make whole" award for all of the injuries they suffered, including the injuries for which the plan paid medical expenses. See *Hamrick's*, 115 S.W.3d at 476

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[13] The theory of respondent's action under Section 502(a)(3) is that $74,869.37 of petitioners' recovery from third parties belongs in good conscience to the plan, because petitioners were obligated by the plan's terms to reimburse the plan from the recovery. Petitioners' assertion that they are not unjustly enriched if they have not first used the tort recovery to pay *other* expenses or to compensate them for *other* injuries lacks any comparable grounding in the terms of the ERISA plan, which, as Section 502(a)(3) itself makes clear, are to govern in an action for appropriate equitable relief such as this.

(party relying on make whole doctrine has burden of proving that he or she was not made whole). Nor did they argue in the court of appeals or in their petition for certiorari that they were not made whole by the recovery. In addition, this case is a particularly unlikely case for application of "make whole" principles because the third-party recovery dwarfs the plan's claim for reimbursement. See Pet. App. 15a ($750,000 third-party recovery and $74,869.37 reimbursement claim). Accordingly, even if petitioners were correct that an insurer may not be awarded reimbursement until the insured has been made whole, there would be no basis in this case to reduce or eliminate the judgment in respondent's favor.[14]

3. In any event, nothing in ERISA prohibits a plan sponsor from adopting plan terms that require full reimbursement for payment of medical expenses, and ERISA's goal of minimizing the costs to employers of providing welfare benefits, see *Inter-Modal*, 520 U.S. at 515, would be furthered by allowing it to do so. Cf. *United States* v. *Lorenzetti*, 467 U.S. 167, 177 (1984) (Federal Employees Compensation Act's goal of minimizing costs requires employee who receives workers' compensation benefits to use a third-party recovery to repay the government "regardless of whether the third-party recovery includes compensation for losses other than medical ex-

[14] The Court also has no occasion to consider whether a plan in a reimbursement action should be charged a proportionate share of the attorney's fees a participant or beneficiary incurs in obtaining a third-party recovery. See Ass'n of Trial Lawyers of Am. Amicus Br. 29-30 (arguing for such fee sharing); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 360-362 (5th Cir. 2003) (plan terms may preclude fee sharing), cert. denied, 541 U.S. 1072 (2004); *Administrative Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 692 (7th Cir. 2003) (same), cert. denied, 542 U.S. 945 (2004); *Yerby* v. *United Healthcare Ins. Co.*, 846 So. 2d 179, 190-191 (Miss. 2002) (no fee sharing unless plan terms provide for it). The plan here paid its share of attorney's fees, and neither party has sought review of that issue.

penses and lost wages").[15] The lower courts have generally recognized that clear plan terms must be given effect, notwithstanding arguments to apply "make whole" principles. See, *e.g.*, *Copeland Oaks*, 209 F.3d at 813; *Cagle* v. *Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997); *Barnes* v. *Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1394 (9th Cir. 1995); *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir.), cert. denied, 510 U.S. 916 (1993). Petitioners do not dispute that the relevant terms in this case are clear in requiring reimbursement, see Pet. Br. 33-34, and they therefore should be enforced.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[15] Among other things, the full reimbursement provision avoids the potential for strategic behavior in structuring a settlement by the insured and tortfeasor, who generally will have little reason to resist classifying damages as flowing from something other than medical costs.

[16] This case therefore does not present any question of invoking the "federal common law of rights and obligations under ERISA-regulated plans," *Pilot Life*, 481 U.S. at 56, in construing ambiguous plan terms. Cf. *Copeland*, 209 F.3d at 813. The case likewise does not present the question whether a court, because of extraordinary circumstances in a particular case, could limit the enforceability of a plan term by applying applicable equitable principles.